2004

The View Condominium Owners Association, a Utah condominium association v. MSICO, L.L.C., a Utah limited liability company; the Town of Alta, a political subdivision of the State of Utah; and John Does 1 through 10: Petitioner's Reply Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE VIEW CONDOMINIUM OWNERS ASSOCIATION, a Utah condominium association,	:	
Plaintiff, Cross-Petitioner and Respondent,	:	Civil No. 20040369-SC
vs.	:	
MSICO, L.L.C., a Utah limited liability company; the TOWN OF ALTA, a political subdivision of the State of Utah; and JOHN DOES 1 through 10,	:	
Defendants, Petitioners and Cross-Respondents.	:	

PETITIONERS' REPLY BRIEF

Review on Writ of Certiorari
to the
Court of Appeals of the State of Utah

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INTRODUCTION

This case presents the two issues framed by this Court's order partially granting cross-petitions for writ of certiorari: 1) whether Alta's revised snow storage plan effected a taking of plaintiff's property; and 2) whether the restrictive parking covenant was terminated by plat amendment. (Addendum attached to Petitioners' Opening Brief, hereafter "Add.," at 1.) The material facts are not in dispute; accordingly, these issues may properly be decided as a matter of law.

Regarding the taking issue, defendants/petitioners demonstrated in their opening brief that plaintiff, as owner of Lot 8, has no protectable property interest in perpetual snow storage on MSI's neighboring Lot 9. Rather, plaintiff has only a temporary license, which is subject to revocation by the Town of Alta pursuant to its broad police power to regulate snow removal for the safety of residents. As originally granted, the right to store snow on Lot 9 was only temporary, to be exercised during the development of Lot 8, or until the future development of Lot 9. To impose a *permanent* servitude on Lot 9, thereby forever precluding development of Lot 9, would constitute a taking of Lot 9. (Pet. Brf. 14-19.)

Moreover, Alta's adoption of an alternative snow storage plan for Lot 8 did not take or damage plaintiff's use of Lot 8. With the revised plan, plaintiff still has full access to, and use of, its own Lot 8. Any supposed inconvenience to plaintiff in pushing its snow beyond Lot 9 does not render Alta's revised plan unconstitutional under the taking provision. Neither has plaintiff identified any material fact dispute that requires remand of the taking issue to the district court. (Pet. Brf. 19-24.)

Regarding the parking issue, defendants demonstrated in their opening brief that the parking covenant on the original Lot 5 was extinguished by the recording of the Amended Plat, which eliminated central parking and provided separate parking on each lot. The Amended Plat, filed prior to plaintiff's purchase of Lot 8, plainly provides for residential units on Amended Lot 5, with no reference to a central parking structure on that lot. Moreover, plaintiff has always parked on its own Lot 8 and has never asserted a right to park across the street on Lot 5, until raising the issue here to block development of Lot 9. Accordingly, any supposed parking covenant has been abandoned due to non-enforcement. (Pet. Brf. 24-30.)

Plaintiff has failed legally to refute the foregoing points of law. Accordingly, this Court should 1) reverse the court of appeals ruling that Alta's revised snow storage plan could constitute a taking of plaintiff's Lot 8; and 2) affirm the court of appeals ruling that the covenant for parking on original Lot 5 was terminated by the Amended Plat, which eliminated parking on the amended Lot 5.

ARGUMENT

POINT I: ALTA'S REQUIREMENT THAT SNOW FROM LOT 8 BE STORED AT SITES OTHER THAN LOT 9 DOES NOT CONSTITUTE A TAKING OF LOT 8.

Plaintiff does not dispute that, to establish a taking, it must demonstrate some protectable interest in property that is taken or damaged by government action. (Resp. Brf. 44.) Using a rather superficial analysis, the court of appeals found a protectable property interest in plaintiff's ownership of Lot 8. The court then concluded that "The View would be damaged by the removal of the Lot 9 snow storage designation" because,

with no place to store its snow, occupancy of plaintiff's property may be precluded. (Ct. App. Op., Add. 2, ¶ 36.) In their opening brief, defendants demonstrated the error of the court's analysis, showing that plaintiff possessed only a temporary license to store snow on Lot 9 and that the revised snow storage plan does not affect the access to, or use of, plaintiff's Lot 8. (Pet. Brf. 17-19, 21-23.)

Apparently conceding the fallacy of the court's analysis and the validity of defendants' arguments, plaintiff has now shifted its taking argument to assert the taking of an implied easement for snow storage on MSI's Lot 9. (Resp. Brf. 45-47.) As plaintiff notes, the court of appeals remanded the easement issue for supposed legal error, without even addressing whether the legal elements of an implied easement exist. (Ct. App. Op., ¶ 32.) The court also remanded the related estoppel issue based on supposed factual disputes. (*Id.* ¶ 34.) The easement and estoppel issues are now inextricably related to the taking claim because plaintiff now asserts these property interests as the sole basis for its taking claim, separate from its ownership of Lot 8. Because plaintiff has shifted its legal argument to rely on the easement and estoppel claims to support its taking claim, defendants urge this Court to resolve all three claims on this appeal as a matter of law, and thereby render unnecessary any remand of issues related to snow storage. Such a course would not only foster judicial efficiency, but would avoid the inequity of allowing plaintiff to assert the taking of property interests that cannot otherwise be scrutinized until remand. In short, to fully resolve the taking claim, this Court should resolve the easement and estoppel claims as well, and thereby completely dispose of the snow storage dispute on this appeal.

A. No Protectable Property Interest.

Relying exclusively on plaintiff's ownership of Lot 8 for the taking claim, the court of appeals acknowledged that plaintiff has no property interest in MSI's Lot 9: "[T]he heart of the takings claim is the interest that The View asserts in Lot 8 itself. Thus, the fact that *The View lacks a distinct property interest in Lot 9* is not fatal to its takings claim." (Ct. App. Op., ¶ 36 n.3, emp. add.) As noted, plaintiff now seeks to remedy that deficiency by asserting a supposed property interest in Lot 9 based on implied easement or estoppel. (Resp. Brf. 45-46.) However, this Court should reject plaintiff's easement and estoppel claims as a matter of law.

B. No Implied Easement.

The court of appeals revived and remanded plaintiff's easement claim solely on the basis that recording is not necessary to a valid easement. (Ct. App. Op., ¶ 32.) However, regardless of recording, plaintiff has never established the legal elements of an implied easement. Accordingly, the court of appeals should have affirmed the nonexistence of an easement on the alternative grounds that plaintiff cannot establish the elements of an easement, as a matter of law. *See A.K. & R. Whipple Plumbing and Heating v. Aspen Const.,* 1999 UT App 87, ¶ 15, 977 P.2d 518 (appellate court has "obligation to affirm the trial court on any available basis").

As set forth in *Potter v. Chadaz*, 1999 UT App 95, ¶ 16, 977 P.2d 533, to establish an implied easement, the claimant must prove the existence of four legal elements:

> (1) unity of title followed by severance; (2) at the time of severance the servitude was apparent, obvious, and visible; (3) the easement is reasonably necessary to enjoy the dominant estate; and (4) use of the easement was continuous rather than sporadic.

For example, in *Chournos v. Alkema*, 494 P.2d 950 (Utah 1972), this Court found an implied easement to access the claimant's property over a road that had been used for access and was visible at the time of severance. Similarly, in *Butler v. Lee*, 774 P.2d 1150 (Utah App. 1989), the court found an implied easement for continuing access to storage units across an adjacent parking lot, access that had been exercised and apparent at the time of conveyance.

On the undisputed facts before this Court, plaintiff cannot establish the second or third elements of an implied easement, as a matter of law. In 1984, at the time the Amended Plat was recorded, both Lots 8 and 9, then undeveloped, were owned by the original developer, Sorenson Resources Company. At the time Sorenson conveyed Lot 8 to plaintiff's predecessor, on January 4, 1985, it was not "apparent, obvious, and visible" that the owner of Lot 8 had an implied right to store snow on Lot 9. Rather, the Amended Plat showed that both lots would be developed with residential units; accordingly, neither lot could be used indefinitely to store snow from the other lot. (Add. 86.) The letter from Walt Plumb, on which plaintiff relies for a snow storage right, was not written until February 27, 1985, nearly two months after severance. (Add. 105.) Alta's approval of interim snow storage on Lot 9 was not provided until March 5, 1985. (Add. 111.) Neither is snow storage on Lot 9 "reasonably necessary" to the use and enjoyment of Lot 8. Alta's revised snow storage plan, approved to allow development of

Lot 9, provides reasonable alternative storage sites. (Add. 124, 133, 143.) Accordingly, plaintiff's use of adjacent Lot 9 for snow storage, while more convenient, is not "necessary."

Because plaintiff has failed to establish the legal elements for an implied easement, this Court should conclude, as a matter of law, that plaintiff has no easement. Therefore, plaintiff cannot rely on a hypothetical easement, which cannot be proved on remand, as a protectable property interest for the purpose of its taking claim on this appeal.[1]

C. No Right of Equitable Estoppel Against Alta.

As set forth in *Consolidated Coal Co. v. Utah Division of State Lands and Forestry*, 886 P.2d 514, 522 (Utah 1994), to establish equitable estoppel, the claimant must prove:

> (1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

When estoppel is asserted against a governmental entity, the claimant must also show that it acted with "reasonable prudence" in reliance on government representations, that

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[1] Plaintiff relies on *Hampton v. State*, 445 P.2d 708 (Utah 1968), to support its claim that Alta "took" plaintiff's supposed easement right to store snow on the neighbor's Lot 9. (Resp. Brf. 45.) However, *Hampton* dealt with the loss of an established right of access to the owner's property resulting from freeway construction. Moreover, *Hampton* acknowledges that property rights are "subject to reasonable restrictions under the police power." 445 P.2d at 711. Here, Alta's revised snow removal plan does not restrict access to or use of Lot 8; rather, the plan is a reasonable exercise of police power to direct the disposal of snow to sites other than Lot 9, in order to allow the development of Lot 9.

injustice would result in the absence of estoppel, and that estoppel would have no substantial adverse impact on public policy. *Id. See also Weese v. Davis County Commission*, 834 P.2d 1, 4-5 (Utah 1992) ("Utah recognizes the general rule that estoppel may not be asserted against a governmental entity.")

Here, the court of appeals deviated from the acknowledged general rule barring estoppel against a governmental entity. Citing *Anderson v. Public Serv. Comm'n*, 839 P.2d 822 (Utah 1992), the court applied an "unusual circumstances" exception, based on supposed "very specific written representations" by the government entity. The court concluded that because "Alta made numerous written representations to The View indicating that Lot 9 had been reserved for snow storage . . . [,] the estoppel claim against Alta cannot be barred based on Alta's status as a governmental entity." (Ct. App. Op., ¶ 34 n.2.) However, this conclusion is based on the fundamental *misperception*, fostered by plaintiff, that the authority for snow storage on Lot 9 was *permanent and irrevocable*. Neither plaintiff nor the court of appeals can cite a single writing in support of that notion.

As noted above, the Amended Plat plainly shows planned residential units for *both* Lots 8 and 9. *The Amended Plat plainly does not dedicate Lot 9 to perpetual snow storage for Lot 8.* (Add. 86.) Two months after conveyance of Lot 8, the developer proposed *temporary snow storage* on Lot 9 as an accommodation to assist plaintiff's predecessor in obtaining a building permit from Alta. The Plumb letter of February 27, 1985 specifically limits the right of storage to the period during development of Lots 6 and 8 as part of the first 100 units. The letter emphasizes that "storage areas may

change" as additional lots and units are developed. (Add. 105.) Alta's letter to plaintiff's predecessor, dated March 5, 1985, was based on the Plumb proposal, reciting the understanding that the proposal addressed storage only for the first 100 units. Nowhere does that letter suggest that disposal on Lot 9 would be permanent. (Add. 111.) Neither does Russ Harmer's approval of the plan suggest that the arrangement would be permanent. (Add. 114-15.) Alta's letter of November 17, 1998, written to inform plaintiff of the litigation with MSI, merely restates Alta's understanding that Lot 9 was designated as the snow storage area for Lot 8; nowhere does the letter state that the right of storage on Lot 9 is permanent. (Add. 119.) The only other document that could be construed as a communication to plaintiff is the town resolution of August 27, 1999, which states that "Lot 9 was committed for snow storage by the developer *until such time as other adequate snow storage areas are provided*." (Add. 123, emp. add.)

Accordingly, the court of appeals' conclusion that Alta promised plaintiff perpetual snow storage on Lot 9 finds no support in the undisputed record. Alta never represented to plaintiff that its right of snow storage on MSI's Lot 9 would never be changed. In fact, Russell Watts, the officer and agent of plaintiff's predecessor, testified that he understood from the beginning that "the designation of the adjacent Lot 9 for a snow storage area was temporary and subject to change." (Add. 101.) Absent a "very specific written representation" from Alta to plaintiff that Lot 9 snow storage was permanent, the "unusual circumstances" exception to the rule barring estoppel against the government does not apply.

In summary, the requirements for estoppel against Alta do not apply here. First, Alta has made no inconsistent statement. No one disputes that Alta authorized temporary snow storage on Lot 9, but Alta has never stated to plaintiff that such storage would never change. Second, plaintiff has not acted with "reasonable prudence" in assuming that the use of Lot 9 would be permanent; plaintiff could not reasonably assume that MSI would never develop Lot 9, but would instead leave that valuable lot open for plaintiff's perpetual use and convenience in dumping excess snow. Third, plaintiff has produced *no evidence* of injury in being required to push its snow beyond Lot 9 to other designated sites. Contrary to the court of appeals' assertion (Ct. App. Op., ¶ 34), plaintiff produced no evidence of cost impact. Fourth, barring estoppel against Alta produces no injustice because plaintiff is afforded other reasonable sites for snow storage. And fifth, application of estoppel against Alta would adversely affect public policy by exposing almost any regulatory action affecting property to a takings claim. Local governments would be hamstrung in their efforts to regulate property use for the safety of residents. If Alta cannot as much as redirect snow disposal to plan for further orderly development, its police powers are severely restricted. *See Consolidated Coal Co., supra,* at 522-23; *Weese, supra,* at 4-5.

This Court should conclude as a matter of law that estoppel does not apply against Alta, and that plaintiff consequently cannot rely upon a supposed estoppel interest in Lot 9 to support its taking claim on this appeal.[2]

D. No Property Has Been Taken or Damaged.

Plaintiff cites several cases describing the types of property damage that could be found to constitute a "taking." (Resp. Brf. 47-49.) However, none of those cases is even close to the facts of this case. Plaintiff has cited no case in which denial of access to a *neighbor's* property, without restricting access to the claimant's property, is held to be a taking of the claimant's property. Plaintiff claims loss of a "snow storage easement," but as shown above, plaintiff's use of MSI's Lot 9 did not create an easement, as a matter of law. Plaintiff claims damages, while acknowledging that "the amount is not yet established." (*Id.* at 49.) However, the time to prove damages for a takings claim was in the district court; plaintiff cannot expect to avoid summary judgment if it fails to prove an essential element of the claim. Neither should plaintiff be granted a second chance to prove its claim on remand. If litigants could reverse judgments on appeal with the promise to prove their case on remand, litigation would never end. In any event, the

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[2] Plaintiff cites *Diamond B-Y Ranches v. Tooele County*, 2004 UT App 135, 91 P.3d 841, to support its claim of a protectable property interest. (Resp. Brf. 46.) However, in that case, the plaintiff alleged that its property was rendered "worthless" by the denial of a permit for a gravel pit. Here, plaintiff's use and enjoyment of Lot 8 is unaffected by the requirement to push its snow to sites other than Lot 9. In fact, under the authority of *Diamond B-Y Ranches*, it is MSI that would have a takings claim if Alta permanently appropriated Lot 9 for plaintiff's snow disposal, thus rendering Lot 9 worthless for future development. No property owner can be forced to dedicate its property for the perpetual use of its neighbor without just compensation.

attorney letter of November 17, 1998 (Add. 119), relied upon by plaintiff and the court of appeals to indicate a threat to plaintiff's use of Lot 8, was written *two years before* the MSI/Alta settlement agreement that fully resolved the snow removal issue without any loss of access to Lot 8 (Add. 133).[3]

In sum, plaintiff has demonstrated no "taking" of Lot 8 by being required to store snow at near-by sites other than MSI's Lot 9. Plaintiff has no protectable property interest in the perpetual storage of snow on Lot 9, and plaintiff has proven no substantial damage or impairment to Lot 8. Therefore, this Court should reverse the court of appeals ruling and hold that no taking of plaintiff's property resulted from Alta's revised snow storage plan.

POINT II: THE PARKING COVENANT FOR ORIGINAL LOT 5 WAS TERMINATED BY THE AMENDED PLAT AND DOES NOT APPLY TO AMENDED LOT 5.

As shown in defendants' opening brief, restrictive covenants and related plats are construed together under the rules of contract construction to determine and enforce the intent of the parties. (Pet. Brf. 24.) Plaintiff does not dispute the rules of construction, it simply interprets the documents contrary to the parties' intent. Specifically, plaintiff does not dispute that Sorenson reserved the unilateral authority to amend the Declaration and

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[3] Plaintiff makes no effort to question the cases cited by defendants showing no compensable taking in this case. (*See* Pet. Brf. 14-23.) Instead, plaintiff relies on *Three D Corp. v. Salt Lake City*, 752 P.2d 1321, 1326 (Utah App. 1988), which held that a roadside curb built by the city along the front of the claimant's property effected a taking by reducing storefront parking and thereby devaluing the property. However, plaintiff has proven *no impairment or devaluation* of Lot 8 caused by the requirement to store snow at sites other than Lot 9. In fact, *Three D Corp.* cites and distinguishes cases, like the instant case, in which an exercise of police power has only incidental impact on the affected property. *Id.* at 1325.

Plat, or that Sorenson validly amended the Plat; rather, plaintiff argues only that the parking covenant was unaffected by the Amended Plat and remained applicable to the *amended* Lot 5. (Resp. Brf. 17-20.) However, as the court of appeals correctly held (Ct. App. Op., ¶¶ 26-28 n.1), that argument finds no support in the language of the documents or the undisputed record.

A. Plain Terms of the Declaration and Plats.

A summary of the key provisions of the Declaration, Original Plat, and Amended Plat demonstrates the correctness of the court of appeals' conclusion:

1. Sorenson reserved the unilateral right to amend the Declaration and the Plat, "at any time," for the purpose of changing lot density, configuration, size, or location. Accordingly, the "majority procedures" for amendment, cited by plaintiff (Resp. Brf. 19), do not apply. (Declaration, Section13.2, Add. 79; Original Plat, Add. 84.)
2. The Plat and any amendments thereto are incorporated into the Declaration by reference. (Declaration, Section 1.19, Add. 34.)
3. Sorenson's right of amendment includes the right to change the number, location, size, and density of the lots. Such changes are effected by amending the Plat. (Declaration, Sections 2.1.2 and 2.1.5, Add. 36-37; Original Plat, Add. 84.) Contrary to plaintiff's argument (Resp. Brf. 20 n.4), inherent in these listed rights is the power to change the *use* of the lots. For example, changing the "density" of a lot from zero units to sixty-five units clearly changes the use of the lot from nonresidential to residential. Changes in the size of a lot also

necessarily determine or limit its use. (*See* Ct. App. Op., ¶ 28 n.1, illustrating how the Declarant could have reduced Lot 5 to "the size of a single parking stall," thereby precluding its use for a parking structure.)

4. The Amended Plat changed the density/use of Lots 4 and 5 from 85 units on Lot 4 and no units on Lot 5 to a combined 65 units on both lots, with no central parking on Lot 5. (Plat, Add. 84; Amended Plat, Add. 86.) The lots are also relocated and reconfigured, with Original Lot 5 subsumed into Amended Lots 6, 8, and 9. Two-thirds of original Lot 5 is included in Amended Lot 8. Original Lot 5 no longer exists, and Amended Lot 5 is no longer contiguous to Lot 8, but is situated across the road on land that was originally Lot 4. (*See* Overlay Map, R. 421-22, Add. 90-91.)

Accordingly, the plain terms of the Declaration and Plats show that the parking structure planned for Original Lot 5 was eliminated in the Amended Plat. The change in density/use of Lot 5 from no units and "parking" on the Original Plat to 65 units and no parking on the Amended Plat was incorporated by reference into the Declaration, rendering the parking covenant in Section 3.1 inoperative and unenforceable.

The cases cited by plaintiff do not support a different result. For example, *Dansie v. Hi-Country Estates Homeowners Ass'n*, 1999 UT 62, 987 P.2d 30, stands for the undisputed point that subdivision restrictive covenants do not apply by implication; rather, they generally must be expressed in a written instrument. The Declaration and Amended Plat satisfy this requirement in the present case. The Amended Plat plainly provides that Amended Lot 5 is to be used for residential units, without any reference to a

parking structure. Thus, the residential use is explicit, while any other use would have to be "implied." In addition, plaintiff cites *Claremont Property Owners Ass'n v. Gilboy*, 542 S.E.2d 324 (N.C. App. 2001), which held that subdivision maintenance fees applied to all lots created in the original plat, even though two of the lots were later combined into a single lot by a later plat. The distinction is that the later plat did not authorize a single fee for the combined lots, so the original fee requirement continued to apply to both lots. By contrast, the Amended Plat in the present case plainly and expressly changes the use of Lot 5 from parking to residential units. Accordingly, the original parking covenant has no application to the Amended Lot 5.[4]

In sum, the plain terms of the Declaration and Amended Plat demonstrate Sorenson's intent to use the new Lot 5 for residential units rather than parking. The original parking covenant was rendered inoperative and has no application to the Amended Lot 5.

B. The Defunct Parking Covenant Does Not Run With the Land.

Plaintiff argues that the parking covenant, "[a]s the obligation continues to exist," runs with the land and should therefore be enforced against MSI, as owner of Amended

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[4] Plaintiff mischaracterizes the court of appeals decision as approving an "implied" amendment of the Declaration, complaining that a lot purchaser would have no notice of such an amendment. (Resp. Brf. 24 n.6.) However, as noted above, the Declaration specifically authorizes lot density and use changes by plat amendment. Here, the plat amendment was written, recorded, and expressly incorporated into the terms of the Declaration; there was nothing "implied" about it. Anyone "analyzing" the Declaration would be on notice to examine the latest plat. As the court of appeals observed: "The View's predecessors in interest purchased Lot 8 *after* Sorenson had created and recorded the Amended Plat. The changes made in the Amended Plat . . . support the conclusion that Lot 5's prior designation as a parking lot was now obsolete." (Ct. App. Op., ¶ 27.)

Lot 5. (Resp. Brf. 27.) Plaintiff cites the Declaration and case law for the undisputed point that valid covenants run with the land. However, plaintiff's premise, that this particular covenant "continues to exist," is in error. As demonstrated above, the parking covenant was terminated or rendered inoperative by the Amended Plat, which removed the parking designation from Lot 5. Having no further legal force or effect, the parking covenant cannot run with the land, but is void and unenforceable.

Plaintiff cites *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618 (Utah 1989) (Resp. Brf. 25-27, 32-33), which held that a covenant to pay mineral royalties to the surface owner of the land was a covenant running with the land. Accordingly, the new surface owner was held entitled to the entire royalty even though the prior surface owner had purportedly conveyed a portion of the royalty to a third party. However, that case is distinguishable because: (1) the surface owner's right to payment, by the terms of the covenant, was nontransferable; and (2) the original obligor, who was not a party to the action, had not agreed to change or terminate the covenant. By contrast, the Declarant in the present case reserved the unilateral right to amend the covenants and did so by recording the Amended Plat, which expressly removed the parking designation

from Amended Lot 5. Because the parking covenant was thus terminated prior to conveyance of the land, there is no question whether the covenant runs with the land.[5]

C. Undisputed Testimony Confirms the Intent to Terminate the Parking Covenant.

Defendants demonstrated in their opening brief that, when construed together, the Declaration, Plat, and Amended Plat plainly show the intent to terminate the parking covenant. Accordingly, no ambiguity analysis is required. (Pet. Brf. 24-30.) *See Swenson v. Erickson*, 2000 UT 16, ¶ 19, 998 P.2d 807 (the "most reasonable interpretation" of an unambiguous restrictive covenant is enforced as a matter of law). The court of appeals applied a dual analysis, concluding from both unrebutted extrinsic evidence (Ct. App. Op., ¶ 26) and from the documents alone (*id.* ¶ 27) that Sorenson intended to terminate the parking covenant. Plaintiff appears to argue that the documents are ambiguous, and that the question of Sorenson's intent must therefore go to a jury. (Resp. Brf. 35-40.) However, plaintiff's analysis is flawed and inconsistent with its other assertions that the documents are "unambiguous." (*See id.* at 34, 38.)

The law is clear that "interpretation of restrictive covenants is governed by the same rules of construction as those used to interpret contracts." *Swenson, supra,* ¶ 11.

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[5] Plaintiff also argues that the parking covenant should be enforced by virtue of references to the Declaration, Plat, and Amended Plat in its deed conveying Lot 8. (Resp. Brf. 27-29.) Again, defendants do not question the legal principle that grantees of lots in a subdivision encumbered by valid covenants can generally sue to enforce the covenants. As demonstrated above, however, the parking covenant was terminated and ceased to exist *prior to conveyance of Lot 8*. As plaintiff concedes, it "had actual as well as constructive notice" of the planned use of Lot 5, as set forth in the Amended Plat. (*Id.* at 28.) The Amended Plat shows the change on Lot 5 from parking to residential units. (Add. 86.) Plaintiff's deed contains nothing different, and therefore adds nothing to the analysis.

The basic rule of contract construction is to determine the intent of the parties from the content of the governing documents, construed together. If the documents are unambiguous, which is a question of law, the intention of the parties is enforced as a matter of law. *Peterson v. Sunrider Corp.*, 2002 UT 43, ¶¶ 14, 18, 48 P.3d 918. This "plain meaning rule preserves the intent of the parties and protects the contract against judicial revision." *Plateau Mining Co. v. Utah Div. of State Lands and Forestry*, 802 P.2d 720, 725 (Utah 1990). If the documents are considered ambiguous, their meaning becomes a question of fact, and the court may consider extrinsic evidence of intent. *Id.* at 726 (finding of ambiguity does not end the inquiry; rather the trial court should consider extrinsic evidence to determine the meaning of the documents); *SME Industries, Inc. v. Thompson, Ventulett, Stainback and Ass.*, 2001 UT 54, ¶ 14, 28 P.3d 669 ("[f]ailure to resolve an ambiguity by determining the parties' intent from parol evidence is error."). If there is no material dispute in the parol evidence, the factual question of intent may be decided as a matter of law. *Id. See also Willard Pease Oil and Gas Co. v. Pioneer Oil and Gas Co.*, 899 P.2d 766, 770 (Utah 1995) (intent based on "undisputed extrinsic evidence" may be determined on summary judgment); *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1001 (Utah 1991) (factual question of parties' contractual intent determined as a matter of law when no reasonable jury could find differently). On appeal, review of such a factual determination "is strictly limited." *Peterson, supra,* ¶¶ 14, 18.

The court of appeals affirmed summary judgment for defendants based on the undisputed extrinsic evidence of Sorenson's intent. Walt Plumb, Sorenson's corporate

secretary, testified that Sorenson's intent in recording the Amended Plat was to change the overall design of the project to a lower-rise format that would be more visually appealing. Specifically, Sorenson intended to reallocate the building units among the lots to include units on new Lot 5 and eliminate the central parking structure on that lot. Instead, buildings were redesigned and shifted to one side of the lots to allow parking on each lot. Sorenson did not intend that occupants of Lot 8 would park on new Lot 5. (Plumb Dep., R. 428-30, pp. 14-21, 30-33, Add. 95-97.) This evidence is supported by Russell Watts, President of The View Associates, who testified that sufficient parking for Lot 8 occupants was provided on that lot, and that plaintiff's predecessor never bargained for, expected, acquired, or exercised any right to park on new Lot 5. (Add. 100-01.)

Plaintiff presented *no evidence to the contrary*. Even now, plaintiff's only response to the Plumb testimony is to question his credibility (Resp. Brf. 30), which is not appropriate on summary judgment. *See, e.g., Webster v. Sill*, 675 P.2d 1170, 1172 (Utah 1983). Accordingly, the court of appeals correctly affirmed summary judgment for defendants:

> The View has failed to provide *any testimony* from *any witness* . . . that would rebut Plumb's testimony regarding Sorenson's intent. . . . In the absence of any proof to the contrary, Plumb's unrebutted testimony regarding the proper application of the permanent covenant language to the parking agreement is by itself sufficient to support the district court's conclusion that there is no genuine question of material fact on this issue.

> . . . Insofar as this evidence uniformly and irrebutably supports the conclusion that the parking agreement was meant to be temporary, we conclude that the district court correctly granted summary judgment on this issue. [Ct. App. Op., ¶¶ 26, 29, orig. emp.][6]

Accordingly, even if this Court determines that the governing documents are ambiguous with regard to the parking covenant, the court of appeals' conclusion should be affirmed as a matter of law based on the unrefuted extrinsic evidence that Sorenson intended to terminate the covenant through the Amended Plat.

D. The Parking Covenant Has Been Abandoned.

A final, alternative basis to affirm the court of appeals on the parking covenant issue is that the covenant has been abandoned. In *Swenson v. Erickson*, 2000 UT 16, 998 P.2d 807, this Court held that a restrictive covenant may be abandoned based on consideration of:

> (1) the "number, nature and severity of the then existing violations"; (2) "any prior act of enforcement of the restriction"; and (3) "whether it is still possible to realize to a substantial degree the benefits intended through the covenant." [*Id.* ¶ 27, *quoting Fink v. Miller*, 896 P.2d 649, 653-54 (Utah App. 1995).]

Applying that test to the present case, the parking covenant has been forgotten and unenforced for fifteen years, until the filing of this action. Therefore, the covenant, if valid, has been continuously violated for fifteen years. Second, no owner from any lot has sought enforcement of the covenant until now. And third, no substantial benefit can be derived through enforcement of the covenant because all lots, including plaintiff's

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[6] Plaintiff purports to list material issues of fact precluding summary judgment. (Resp. Brf. 29-31.) However, the "facts" listed are either immaterial to the legal issue or not facts at all, but legal conclusions. Plaintiff should not be afforded a second chance to prove in the district court what it failed to prove the first time.

Lot 8, have sufficient parking on each individual lot. The original purpose of the covenant was to centralize parking on Lot 5 for the use of Lots 4 and 6-9. However, when the Amended Plat redesigned the Project to provide parking on each individual lot, a central parking facility on Lot 5 became unnecessary. Accordingly, the "usefulness of the covenant" has been lost, the "purpose of the covenant" can no longer be accomplished, and the covenant is of little or no value to lot owners. *See Swenson, supra,* ¶¶ 22-25. *See also Fink, supra,* 896 P.2d at 653-55.[7]

Accordingly, this Court may properly rely upon legal abandonment of the parking covenant as an alternative basis to affirm the court of appeals on this issue.[8]

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[7] Plaintiff argues that the parking covenant has not been abandoned because there is "[n]o evidence of repeated covenant violations." (Resp. Brf. 41.) However, as shown above, continuous, long-term nonenforcement of an affirmative duty (i.e., to construct a parking facility on Lot 5) is analytically equivalent to repeated violation of a covenant prohibition. Moreover, contrary to plaintiff's argument, "dormancy of the need" to enforce the covenant (Resp. Brf. 42) is a key consideration in determining abandonment of the covenant. *See Swenson, supra,* ¶ 22. Here, the Amended Plat "neutralize[d] the benefits of the restriction, to the point of defeating the object and purpose of the restrictive covenant." *Id.*

[8] As a final point, plaintiff seeks to renew its motion regarding the content of defendants' opening brief, a motion this Court previously denied. (Resp. Brf. 39, n.11.) This Court has "strongly denounce[d]" the practice of "continu[ing] to argue matters previously settled by court rulings." *R & R Energies v. Mother Earth Ind.*, 936 P.2d 1068, 1081 n.10 (Utah 1997). Plaintiff's further argument on the issue is barred by "law of the case," enforcement of which is necessary "to avoid the delays and the difficulties involved in repetitious contentions and rulings upon the same proposition in the same case." *Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950, 969 (Utah App. 1989).

CONCLUSION

Based on the foregoing, this Court should reverse the court of appeals' ruling on the taking claim and affirm the court of appeals' ruling on the claimed parking covenant.

DATED this 28th day of February, 2005.

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CERTIFICATE OF MAILING

I hereby certify that on this 28th day of February, 2005, I caused two true and correct copies of the foregoing **Petitioners' Reply Brief** to be mailed through United States mail, postage prepaid, to the following:

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